82-1206
No.

In the Supreme Court of the United States

October Term, 1982

Thomas Reusser, Administrator of the Estate of
Calvin E. Reusser
Petitioner

v.

American Bankers Insurance Company
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED:

Whether the interpretation of a written contract is a matter of law, and therefore reviewable **de novo.**

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The Petitioner, Thomas Reusser, Administrator of the Estate of Calvin E. Reusser, petitions for a Writ of Certiorari to review the judgment of United States Court of Appeals for the Ninth Circuit entered in this proceeding August 11, 1982.

OPINION BELOW

The opinion of the court of appeals, which was ordered not to be published, appears in Appendix A hereto. The order denying **en banc** consideration appears in Appendix B.

JURISDICTION

The judgment of the court of appeals for the ninth circuit was entered on August 11, 1982. A timely petition for rehearing **en banc** was denied on

October 19, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTION PRESENTED

Whether the interpretation of a written contract is a matter of law, and therefore reviewable **de novo.**

STATUTORY PROVISION INVOKED

Federal Rules of Civil Procedure 52(a)

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

American Bankers Insurance Company (American) brought a declaratory judgment action to determine its liability under a policy issued to Calvin E. Reusser.

Reusser purchased the personal accident insurance by initialing acceptance on a car rental agreement. The acceptance acknowledged that he had read the coverage limits furnished in a synopsis. The synopsis, containing the intoxicant exclusion clause, was available in a rack adjacent to the rental counter.

The clerk at the counter did not recall the transaction with Reusser, but testified that she usually referred a customer to the brochure only upon being questioned about coverage.

Reusser was killed while driving the rental car in an intoxicated condition. The district court, sitting without a jury, found that Reusser had in fact read the brochure containing the exclusion condition and that American was not liable to Reusser's estate for the policy benefits.

The appellate court did not rule on the issue of fact as to whether or not Reusser read the brochure. Instead, the appellate court found that the district court's findings implicitly included the determination that the acknowledgment statement adequately notified the signer of the condition in the brochure, and stated that the determination was not clearly erroneous.

REASONS FOR GRANTING THE PETITION

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER STANDARD OF REVIEW APPLIED TO THE INTERPRETATION OF A WRITTEN CONTRACT.

Judge Learned Hand, writing for the court in *Eddy v. Prudence Bonds Corporation,* 165 F.2d 157, 163, certiorari denied, *Prudence Realization Corporation v. Eddy,* 333 U.S. 845, S.Ct. 664, 92 L. Ed. 1128, (2nd Cir. 1947), stated that "Appellate Courts have untrammelled power to interpret written documents."

Some scholars have questioned whether this is a workable rule. *(Weiner, The Civil Nonjury Trial and the Law-Fact Distinction,* Calif.L.Rev. 120, 1054 (1967). Some jurisdictions do not apply Judge Hand's pronouncement where the district court's decision was based on depositions, or documents that require non-legal expertise. (*Jennings v. General Medical Corporation,* 604 F.2d. 1300 (10th Cir. 1979); *Clark Equipment Company v. Keller,* 570 F.2d 778, certiorari denied, 99 S.Ct. 96, 439 U.S. 825, 58 L.Ed. 118 (8th Cir. 1978).

Likewise, where the parties to a contract negotiated the terms thereof, the extrinsic facts of what went into the negotiation are reviewable only by the stricter "clearly erroneous" standard. *(West v. Smith,* 101 U.S. 263, 270, 25 L.Ed. 809 (1879).

But where, as here, the only question is the

meaning of the words of a contract, at least eight of the other eleven circuits have ruled that they will place their own interpretation on the words of the written contract.*(Holtze v. Equitable Life Assur. Soc. of U.S.*,548 F.2d 1037, 179 U.S.App.D.C.82 (1976); *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532, 537 (2d Cir. 1974); *EMOR, Inc. v. Cyprus Mines Corporation*, 467 F.2d 770,773 (3d Cir.1972); *In Re Stratford of Texas, Inc.* 635 F.2d 365, 368 (5th Cir. 1981); *Industrial Equipment Co. v. Emerson Elec. Co.*, 554 F.2d 276, 284 (6th Cir. 1977); *Wiesmueller v. Interstate Fire and Cas. Co.*, 568 F.2d 40, 42 (7th Cir.1978); *Western Contracting Corporation v. The Dow Chemical Co.*, 664 F.2d 1097, 1100 (8th Cir. 1981); *Southwestern Stationery & Bank v. Harris Corp.*, 624 F.2d 168, 170 (10th Cir. 1980).

The remaining circuits, the first, the fourth and the eleventh, do not appear to have made rulings contrary to these last cited opinions. We are unaware that the Supreme Court of the United States has yet ruled on the specific issue.

It is noted that the ninth circuit has decided not to publish their opinion, and have thus avoided written precedent in contradiction to the accepted standard of review. We presume that the precedent has, nevertheless, been established. It is unthinkable that the failure to publish is merely an expedient method of avoiding the establishment of an unfounded rule of law, and it is therefore apparent that the precedent stands in the minds of the judges that heard the case and those that reviewed the petition for **en banc** consideration.

2. IF THE OPINION BELOW IS ALLOWED TO STAND, A FINDING OF FACT STANDARD OF REVIEW CAN BE APPLIED TO A CONCLUSION OF LAW, MAKING THE DISTINCTION BETWEEN FACT AND LAW MEANINGLESS.

Written contracts affect every individual. In this day, insurance contracts are perhaps the most ubiquitous. Insurance contracts, beginning with maternity benefits and ending with burial policies, apply to nearly every phase of our lives.

When interpreting a contract, a trial judge may not create a finding of fact merely by labeling his decision as such. *(Tri-Ton Intrn. v. Velto,* 525 F.2d 432, 435 (9th Cir. 1975). But if the "clearly erroneous" standard of review is applied to the interpretation of a contract, the result is the same. In effect, the trial courts' decisions on the meanings of the written words in any contract become as findings of fact, reviewable only if clearly erroneous. If the ninth circuit's opinion is valid, we have lost a protection from a degree of arbitrariness or prejudice on the part of a trial judge that has heretofore been afforded by the appellate system to everyone who enters into a written contract.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the ninth circuit.

DATED this 14th day of January, 1983.

Respectfully submitted,

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